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NGU CHU CHIONG

v.

LINA SOO

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COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: Q-02-225-1999]

C

25 JANUARY 2008

FAMILY LAW: *Children - Maintenance - Variation - Application for maintenance order to be varied - Application made seven years after alleged need of maintenance - Whether evidence that petitioner not in real need of money - Whether material change in circumstances proved - Whether application fall under exception of r. 91(1)(b) of the Divorce and Matrimonial Proceedings Rules 1980 - Whether respondents agreeable to amount of RM3,000 a month - Non compliance of rr. 63,65 and 66 of the Divorce and Matrimonial Proceedings Rules 1980 - Whether High Court Judge erred in his findings - Whether appeal allowed*

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This was an appeal by the first respondent against the decision of the High Court Judge in allowing the petitioner's application ('the application') filed by way of summons in chambers under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') for a variation of the maintenance order made on 14 June 1989. In support of the application, the affidavit affirmed on 2 November 1998 by the petitioner stated that there had been material changes in the circumstances affecting the child of the marriage and the life of the petitioner and requested that maintenance be doubled from RM1,500 to RM3,000. Having heard arguments from both parties, the High Court Judge had, *inter alia*, held that the petitioner's application by way of summons in chambers was procedurally correct and proper. The High Court Judge also stated that as the respondents did not dispute the amount asked for by the petitioner, he held that the respondents were agreeable to the amount and thus made the order of maintenance which was raised to RM3,000 a month, effective from date of application. Hence, this appeal.

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Held (allowing the appeal):
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) The petitioner's application by way of summons in chambers dated 2 November 1998 had in fact contravened the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') read in conjunction with the provision of the Act. Rules 56(1) and (3) of the 1980 Rules specifically provide for the mode of application for a variation order, such application thus falls under the exception of r. 91(1)(b) of the 1980 Rules. The judge ought to have held that the application should be made by way of Form 11 notice and not by way of summons in chambers. (paras 6 & 7)

(2) In the application made on 2 November 1998, the petitioner claimed for a variation order with effect from January 1991 on the ground that a monthly maintenance of RM1,500 was insufficient for both her daughter and herself since January 1991, some seven years ago. The fact that the petitioner only applied for a variation order seven years after the alleged need for a maintenance of RM3,000 per month first arose was clear evidence that the petitioner was not in real need of a monthly maintenance of RM3,000 per month since January 1991. Furthermore, the affidavit in support of the said application mentioned nothing about the costs of living and the petitioner's needs in 1991. (para 8)

(3) The High Court Judge had erred in fact in holding that the respondents were agreeable to the amount of RM3,000 per month claimed by the petitioner, taking into account the affidavit in opposition affirmed by the first respondent on 25 November 1998 challenging the need to increase the amount. In light of the contradictory allegations contained in the first respondent's affidavit and those of the petitioner, the respondent could not be said to have agreed with the petitioner in respect of the amount claimed. (paras 9 & 10)

(4) The High Court Judge had erred in law in failing to consider the non-compliance by the petitioner of rr. 63, 65 and 66 of the 1980 Rules. From the records in the notes of proceedings, the entire argument before the judge was premised on the erroneous procedures adopted by the petitioner. In addition to

A the incorrect procedure adopted by the petitioner herein, the petitioner had in actual fact filed the summons in chambers under the wrong petition. (paras 11, 12 & 13)

(5) The High Court Judge had also erred when he found that 'it B does not matter in which High Court this application is filed' when in actual fact he should have noted that this application was filed under Divorce Petition No. KG 9 of 1991 to vary an order in Divorce Petition No. KG 61 of 1987. It was not just a matter of one Court hearing the action of another C court. It was a matter of the varying of an order made in a separate proceeding. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh responden pertama terhadap keputusan D hakim Mahkamah Tinggi kerana membenarkan permohonan pempetisyen (permohonan'), yang difail melalui saman dalam kamar di bawah s. 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'), untuk meminda perintah nafkah yang dibuat pada 14 Jun 1989. Bagi menyokong permohonan, E afidavit sokongan pempetisyen yang diikrarkan pada 2 November 1998 menyatakan bahawa telah berlaku perubahan material pada halkeadaan yang menjejaskan kehidupan anak serta pempetisyen sekaligus mewajarkan nafkah digandakan dari RM1,500 ke RM3,000. Setelah mendengar hujah kedua-dua belah pihak, yang F arif hakim Mahkamah Tinggi antara lain memutuskan bahawa permohonan pempetisyen melalui saman dalam kamar adalah betul dan wajar dari segi prosedur. Hakim Mahkamah Tinggi juga menyatakan bahawa oleh kerana responden tidak mempertikai jumlah yang dituntut pempetisyen, maka responden dianggap G bersetuju dengan jumlah tersebut, dan atas alasan itu, telah mengubah perintah nafkah kepada RM3,000 sebulan berkuatkuasa dari tarikh permohonan. Ini mengakibatkan rayuan di sini.

Diputuskan (membenarkan rayuan):

H **Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:**

(1) Permohonan pempetisyen melalui saman dalam kamar bertarikh 2 November 1998 sebenarnya telah melanggar peruntukan peraturan seperti yang dibentang oleh Kaedah-kaedah Prosiding I Perceraian dan Perkahwinan 1980 ('Kaedah-kaedah 1980') dibaca bersama dengan peruntukan-peruntukan Akta. Kaedah-

kaedah 56(1) dan (3) di dalam Kaedah-kaedah 1980 memperuntukkan secara khusus mengenai cara untuk memohon perintah pemindaan, menjadikan permohonan sedemikian jatuh di bawah pengecualian k. 91(1)(b) Kaedah-kaedah 1980. Oleh itu, hakim sepatutnya memutuskan bahawa permohonan hendaklah dibuat melalui notis Borang 11 dan bukannya melalui saman dalam kamar.

(2) Di dalam permohonan yang dibuat pada 2 November 1998, pempetisyen menuntut mendapatan perintah pemindaan berkuatkuasa dari Januari 1991 atas alasan bahawa nafkah bulanan RM1,500 adalah tidak mencukupi bagi beliau dan anak perempuannya sejak Januari 1991, iaitu kira-kira tujuh tahun yang lalu. Fakta bahawa pempetisyen hanya memohon untuk perintah pemindaan tujuh tahun selepas keperluan kepada nafkah RM3,000 sebulan mula berbangkit adalah bukti jelas bahawa pempetisyen tidak berada dalam keadaan yang amat memerlukan kepada nafkah RM3,000 sebulan sejak Januari 1991. Lagipun, afidavit sokongan permohonan tersebut langsung tidak menyebut tentang kos sara hidup dan keperluan-keperluan pempetisyen pada tahun 1991.

(3) Hakim Mahkamah Tinggi khilaf bilamana memutuskan bahawa responden bersetuju dengan amaun RM3,000 sebulan seperti yang dituntut pempetisyen, memandangkan bahawa afidavit bantahan responden pertama bertarikh 25 November 1998 telah membantah kenaikan jumlah tersebut. Mengambilkira alegasi-alegasi bertentangan yang terkandung di dalam afidavit responden pertama dan juga pempetisyen, responden tidak boleh dikatakan sebagai bersetuju dengan pempetisyen mengenai jumlah yang dituntut.

(4) Hakim Mahkamah Tinggi khilaf di sisi undang-undang kerana gagal menimbang ketidakpatuhan pempetisyen kepada kk. 63, 65 dan 66 Kaedah-kaedah 1980. Dari rekod nota prosiding, keseluruhan hujah di hadapan hakim adalah didasarkan kepada prosedur salah yang diikuti oleh pempetisyen. Selain prosedur tidak betul yang diikutinya, pempetisyen juga sebenarnya telah memfailkan saman dalam kamar di bawah petisyen yang salah.

(5) Hakim Mahkamah Tinggi seterusnya khilaf apabila mendapati bahawa 'adalah tidak penting di Mahkamah Tinggi manakah permohonan ini difailkan' sedangkan beliau sepatutnya menyedari bahawa permohonan di sini telah difailkan di bawah

Petisyen Perceraian No. KG 9 Tahun 1991 untuk mengubah perintah di dalam Petisyen Perceraian No. KG 61 Tahun 1987. Ia bukan semata-mata soal sebuah mahkamah mendengar tindakan di mahkamah yang lain. Ia menyentuhi pemindaan suatu perintah yang dibuat di prosiding yang berlainan.

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 2(1), 56(1), (3), 63(1), 65, 66, 91(1)(b)
Law Reform (Marriage and Divorce) Act 1976, s. 83

For the appellant - Alvin Yong; M/s Chong Brothers
For the respondent - Ernest Chua; M/s Ernest Chua & Co

[Appeal from High Court, Kuching; Divorce Petition No: KG 9-1991]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the first respondent against the decision of the learned judge of the High Court at Kuching in allowing the petitioner's application ("the application") filed by way of summon-in-chambers under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") for a variation of the maintenance order made on 14 June 1989. In support of the application, the affidavit affirmed on 2 November 1998 by the petitioner stated that there had been material changes in the circumstances affecting the child of the marriage, namely Emily Jasmine Ngu Beixe, and the life of the petitioner over the past ten years. Emily was then fifteen years old and her needs have increased, and given the high cost of living today, the petitioner had requested that the maintenance be doubled from RM1,500 per month to RM3,000 per month.

Background Facts

[2] The relevant background facts of the case leading to the filing of the application are as follows:

(1) On 17 December 1987, the petitioner filed a Divorce Petition No. KG 61 of 1987 in the High Court (I) at Kuching, praying for *inter alia*, judicial separation, division of property and a monthly maintenance of RM1,500. A consent order was made on 14 June 1989 including a monthly maintenance of RM1,500.

(2) On 25 January 1991, the petitioner filed the present Divorce Petition No. KG 9 of 1991 in the High Court (II) at Kuching, praying for divorce and among other things, ancillary relief of a month maintenance of RM2,000 and property division. The petitioner at the same time filed a notice of application for ancillary relief. The respondents objected to the application on the primary ground that the issues on property division, custody of the child and maintenance had already been settled in the Divorce Petition No. KG 61 of 1987. The Deputy Registrar overruled the objection.

(3) On appeal to the judge in chambers, the learned judge of the High Court allowed the respondents' appeal and ordered that the petitioner's application be strike out with cost.

(4) The petitioner subsequently filed the application by way of a summons-in-chambers on 2 November 1998 to vary the terms of the consent order in Divorce Petition No. KG 61 of 1987 made on 14 June 1989 respecting maintenance.

Preliminary Objection

[3] At the outset of the hearing of the application before the learned judge of the High Court, the respondents had raised preliminary objections on the following grounds:

(1) the application is made in the wrong proceedings;

(2) the application is made by way of a wrong mode;

(3) the application for ancillary relief in the main action had been struck out by this honourable court; and/or

(4) the application is *mala fide* and vexatious.

Finding Of The High Court

[4] Having heard the arguments of both parties the learned judge of the High Court overruled the preliminary objections by the respondents with costs. The learned judge *inter alia* held that the petitioner's application by way of summons-in-chambers dated

A 2 November 1998 is procedurally correct and proper. The learned judge went on to state that as the respondents did not dispute the amount asked for by the petitioner, he held that the respondents were agreeable to the amount. The learned judge then made the order of maintenance which was raised to RM3,000
B per month, effective from the date of the application.

Decision On Appeal

[5] We heard the appeal by the first respondent on 8 May 2007 and we unanimously allowed the appeal. We now give the reasons
C for our decision as follows:

[6] We are of the view the learned judge of the High Court erred in law in holding that the petitioner's application by way of summons-in-chambers dated 2 November 1998 is procedurally
D correct and proper when in fact it contravenes the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ("the 1980 Rules") read in conjunction with the provision of the Act. Rule 2(1) of the 1980 Rules defines "ancillary relief to mean, *inter alia*, a variation order which includes
E an order for maintenance under s. 83 of the Act. Rules 56(1) and (3) of the 1980 Rules provide that an application for a variation order, being not an application for ancillary relief which is required to be made in the petition or answer, shall be made by notice in Form 11 as set out in the Schedule to the 1980 Rules. Rule
F 91(1)(b) of the 1980 Rules provides that except where otherwise provided by the 1980 Rules, every application in a matrimonial proceeding shall be made by summons.

[7] It is our judgment that as rr. 56(1) and (3) of the 1980
G Rules specifically provide for the mode of application for a variation order, such application thus falls under the exception of r. 91(1)(b) of the 1980 Rules. In the premises, the learned judge of the High Court therefore erred in law in holding that r. 91(1)(b) of the 1980 Rules applies to every application in
H matrimonial proceedings including the said application. In our view the learned judge ought to have held that the application should be made by way of Form 11 notice and not by way of summons-in-chambers.

I **[8]** We are also of the view the learned judge of the High Court erred in fact and in law in holding that there is no evidence to show that the application is *mala fide* and vexatious. We noted that the application was made on 2 November 1998 and in the

application the petitioner claimed for a variation order with effect from January 1991 on the ground that a monthly maintenance of RM1,500 was insufficient for both her daughter and herself since January 1991, some seven years ago. There is no time frame within which the petitioner has to bring an application for a variation order. However, the fact that the petitioner only applied for a variation order seven (7) years after the alleged need for a maintenance of RM3,000 per month first arose is clear evidence that the petitioner was not in real need of a monthly maintenance of RM3,000 per month since January 1991. Otherwise, the petitioner would not have waited seven years to make the application. Furthermore, despite the said application being an application for increment of monthly maintenance from RM1,500 to RM3,000 with effect from January 1991, the affidavit in support of the said application mentioned nothing about the costs of living and the petitioner's needs in 1991.

[9] It is our considered view the learned judge of the High Court erred in fact in holding that the respondents are agreeable to the amount of RM3,000 per month claimed by the petitioner in the application, taking into account the affidavit in opposition affirmed by the first respondent on 25 November 1998 challenging the need to increase the amount from RM1,500 to RM3,000. In the first respondent's affidavit affirmed on 25 November 1998, the first respondent denied that costs of living has increased so much that the monthly maintenance of RM1,500 need to be increased to RM3,000. In the first respondent's affidavit, he mentioned that the petitioner was gainfully employed. Although the petitioner denied the allegation, she did mention that she earned some fees from freelance writing.

[10] We take the view that in the light of the contradictory allegations contained in the affidavits of the first respondent and those of the petitioner, the respondent cannot be said to have agreed with the petitioner in respect of the amount claimed by the petitioner in the application. In fact, there are before the court two contentious issues for an investigation to be carried out, that is the needs of the petitioner and the petitioner's income.

[11] We are also of the view the learned judge of the High Court has also erred in law in failing to consider the non-compliance by the petitioner of rr. 63, 65 and 66 of the 1980 Rules. Rule 63(1) of the 1980 Rules provides that any application for a variation

order shall be supported by an affidavit of the applicant setting out the full particulars of the applicant's property and income. Rule 65 of the 1980 Rules provides that the registrar shall then fix a date of hearing of the application for variation order and that during the hearing the registrar shall investigate the allegations contained in the pleadings, take evidence and order the attendance of witnesses and production of documents. Rule 66 of the 1980 Rules provides that after the completion of the investigation referred to in r. 65, the registrar shall make such order as he thinks just, or he may refer the matter to a judge for his decision. The learned judge therefore erred in law in failing to order an investigation as set out in r. 65 of the 1980 Rules.

[12] We further find that the learned judge of the High Court erred in law in deciding the merits of the application when the issue before him in its entirety was merely the preliminary objection raised by the counsel for the respondents. It is clear from the notes of proceedings and the judgment dated 20 February 1999 that the issue argued before the learned judge is merely the preliminary objection on the said application. From the records in the notes of proceedings, it would show the entire argument before the learned judge was premised on the erroneous procedures adopted by the petitioner. The respondents' counsel was not shown to have been allowed to address the court on the merits of the case after the learned judge had made his ruling on the preliminary objection.

[13] We also noted in addition to the incorrect procedure adopted by the petitioner herein, the petitioner had in actual fact filed the summons-in-chambers under the wrong petition. The petitioner seeks to vary an order dated 14 June 1989. An examination of the order dated 14 June 1989 will reveal that the said order was made under Divorce Petition No. KG 61 of 1987. There is no order dated 14 June 1989 in this present divorce petition. In fact this petition was only filed in 1991. The learned judge erred in when he found that "it does not matter in which High Court this application is filed" when in actual fact he should have noted that this application was filed under Divorce Petition No. KG 9 of 1991 to vary an order in Divorce Petition No. KG 61 of 1987. It is not just a matter of one court hearing the action of another court. It is a matter of the varying of an order made in a separate proceeding.

Conclusion

[14] For the reasons above stated, the appeal is allowed with costs here and in the court below. The order of maintenance made by the learned judge of the High Court is hereby set aside. The deposit paid is to be refunded to the first respondent.